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Corporate & Commercial

Invalid notice of a claim

In most business sale agreements, the sellers will indemnify the buyers for claims that arise from pre-sale activities, provided the buyers give the sellers notice of those claims. The notification requirements usually require the sellers to be provided with reasonable details of the matter, the nature of the claim and the amount claimed. As the buyers in a recent case found, **it is better to be cautious and provide full details.** In this case the buyers claim failed because their formal notice of the claim (issued shortly before the deadline) did not provide sufficient detail, particularly about why the company may be liable. The buyers will, perhaps justifiably, be sore about this decision as they had provided information about the claim some time before the formal notice together with regular updates.

Reflective loss

The Supreme Court has overturned 40 years' of case law and ruled that the **reflective loss principle does not restrict claims by unsecured creditors**[2]. Reflective loss describes a situation where a company has a claim against a third party and a creditor also has a claim against the same third party, that's reflective of the loss suffered by the company. In this case, a company director had defrauded the company leaving it with no money to pay the creditor. The reflective loss principle had prohibited a creditor's claims in these circumstances and only allowed the company to pursue the claim. This rule has now been overturned.

Upcoming events

Preparing for a second spike - Tuesday 22 September 10:15 – 11:00

Register Now

Commercial & Employment law update – Wednesday 14th October, 10:30 – 11:00

The rule of law and compliance with the Modern Slavery Act – Wednesday 11th November 10.15 to 11.00. *We will observe 1 minute silence at 11.00*

How to be a great leader - Tuesday 8th December 10.15 to 11.00

Data Security

US Privacy Shield struck down

The Safe Harbor regime that allowed EU companies to lawfully transfer personal data to subscribing US companies, was invalidated in late 2015. It was replaced in 2016 with the **EU-US Privacy Shield but that has now also been struck down by the European Court of Justice**[3] – principally due to concerns that US national security laws allow governments to snoop on EU citizens' data.

Companies are likely to leap to using the EU approved standard contractual clauses (SCCs) as an alternative lawful means of transferring data to US companies, but the Court's decision was clear that SCC's may not be silver bullet and that **companies must risk assess whether the parties can practically comply with the SCCs**, particularly with regard to any obligations under local laws. If there is a conflict, the data transfer is likely to need the approval of the relevant EU data protection authority.

IoT device security

The Government has published its legislative proposals to impose new requirements on the sale of consumer smart devices including a ban on default passwords, requirements on vulnerability reporting and transparency of software updates. In addition, it is planned to appoint a new designated body to oversee compliance. The deadline to respond to the proposals is the 6 September.

Marriott faces UK class-action damages suit over huge data breach

Last year, the UK's Information Commissioner's Office (ICO) provided a notice of its intention to fine Marriot Hotel £99.2m for personal data breaches that compromised the data of 339 million guests. To add to Marriot's woes, a representative action, which automatically includes all affected individuals in England and Wales, is being brought against the hotel.

Cookies

Last year the ICO provided new guidance about the use of Cookies on websites and, specifically that, aside from essential cookies, implied consent is no longer acceptable – so cookie notices that state ***'by continuing to use this website, consent is assumed'*** **are not compliant.** The European Data Protection Board (EDPB) has now updated its guidance and echoed the statements made by the ICO last year. A recent study found that only 11% of cookie consent mechanisms were compliant with the GDPR.

Data Protection Officers – Avoiding a Conflict of Interest

The GDPR requires certain companies whose core activities include large processing of personal data to have a designated Data Protection Officer ('DPO'). The DPO must be able to **perform his or her duties independently**. A Belgian company has been fined €50,000 for not complying with this rule. In this case, the DPO was also the Director of Audit, Risk and Compliance. The Data Protection Authority said there was a conflict between the roles. The title 'director' suggested that he was likely to be directing how data protection was managed and could not therefore also independently advise on it.

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Employment

COVID-19 updates

- **Guarantee on statutory payments** - The government has introduced new rules[4] to ensure that statutory payments to furloughed employees (such as redundancy or notice pay, are based on their normal pay, rather than reduced furlough pay). The rules do not affect the statutory cap on redundancy pay.
- **Statutory sick pay for isolation** - Anyone isolating in accordance with the revised PHE guidance will be entitled to statutory sick pay[5]. This will apply to anyone who has tested positive for COVID-19 or has COVID-19 symptoms and anyone who is living in the same household as an individual with symptoms or a positive test result. For more information, see the latest PHE guidance.
- **Self-isolation after returning to the UK** - The Government has published new guidance for employers and employees on the rules relating to self-isolation after returning to the UK. The guidance covers those who are returning from a country without a quarantine exemption.
- **Furlough bonus scheme** - The Job Retention Bonus is a one-off payment to employers of £1,000 for every furloughed employee who remains continuously employed through to 31 January 2021. Further details are due to be published by the end of this month.

Gig economy

In 2017 the tribunal ruled that a CitySprint courier was a worker, rather than being self employed and therefore entitled to certain rights, including holiday pay.

Following this decision, CitySprint changed its contractual terms to clarify the rights and flexibilities available to its couriers. It seems that the purpose of the changes were to enable CitySprint to justify self employed rather than worker status. A recent Tribunal decision[6] however ruled that a CitySprint Courier is still a worker. **The contractual terms may have changed but the practices had not.**

Equal Pay

A recent Court of Appeal case[7] has provided some useful guidance on equal pay claims:

- Companies are not under a duty to continually review the differences in pay between female workers and their comparators.
- Job evaluations cannot be relied on with retrospective effect to prove equal work.
- Pay differences between male and female comparators can be defended by a material factor. The material factor must be the genuine reason for the pay difference, be caused by that reason, must not comprise any form of sex discrimination and must be a significant and relevant difference.
- If the material factor is indirectly discriminatory on the basis of sex, the employer must show the pay gap is objectively justifiable.
- The material factor defence only becomes relevant when the claimant has proved there is equal work to the comparator.

Dismissal without following a procedure.

A recent Employment Appeal Tribunal (EAT) decision has reached a surprising result[8] – ruling that an employer had fairly dismissed an employee despite not following any procedure, nor offering a right of appeal.

The EAT agreed with the employer that in this case it was entitled to dismiss without following these formalities. The relationship between the employee and her manager had irretrievably broken down leaving any process futile.

This is a rare case and employers will generally be expected to follow procedures before making a decision to dismiss, but it is useful to know that the **absence of any procedures does not automatically make a dismissal unfair.**

Disability discrimination

The EAT has ruled[9] that an employer failed to make reasonable adjustments for an employee, when it refused to undertake that a disabled employee, suffering from reactive depression, would be offered redundancy if there was ever a requirement for her to work with the two colleagues that she had alleged had bullied her.

Cases, laws, decisions referred to in this Bulletin

1	Dodika Ltd v United Luck Group Holdings Ltd [2020] EWHC 2101 (Comm)
2	Sevilleja v Marex Financial Ltd [2020] UKSC 31
3	Data Protection Commissioner v Facebook Ireland and Maximillian Schrems, CJEU C-311/18
4	The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020
5	Statutory Sick Pay (General) (Coronavirus Amendment) (No. 5) Regulations 2020
6	O'Eachtiarna and others v CitySprint (UK) Ltd [2020], ET/2301176/2018
7	Walker v Co-operative Group Ltd and another [2020] EWCA Civ 1075
8	Gallacher v Abellio Scotrail Limited [2020], UKEATS/0027/19
9	Hill v Lloyds Bank PLC UKEAT/0173/19LA